SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000903-001 DT 01/24/2005

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA SAMUEL K LESLEY

v.

JAMES P LIVANAVAGE (001) MARK D DUBIEL

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC
FINANCIAL SERVICES-CCC

RECORD APPEAL RULE / REMAND

PHOENIX CITY COURT

Cit. No. #20029047868

Charge: 1) ASSAULT-INTENT/RECKLESS/INJURE

DOB: 03/17/78 DOC: 12/02/02

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the time of oral argument on November 22, 2004. This court has considered and reviewed the record and proceedings from the trial court, exhibits made of record and the excellent Memoranda submitted.

1. Factual and Procedural Background.

On December 2, 2002, Officer Poggi responded and arrived at the scene of a 9-1-1 call. Upon arrival, Officer Poggi observed the victim, Melissa Hale, sitting in a truck talking on a cell

phone. At trial, Officer Poggi testified that he observed her crying, with noticeable cuts on her arms, bumps on the back of her head and red fingerprint marks around her neck.[1] Officer Poggi asked Hale what had happened or what was going on.[2] In response to the question, Hale allegedly pointed to the defendant claiming, "he strangled me."[3] Within one minute, another officer, Officer Watson, arrived at the scene. Officer Watson testified that he asked Hale to tell him what happened and that she recounted what happened from beginning to end. The statements were recorded and the tape was admitted against the Defendant at trial. In addition, the statements by Hale were recited by the Officer Watson in his testimony at trial.[4] Finally, the 9-1-1 call was admitted without objection.[5] Defendant was subsequently charged with assault in violation of A.R.S. § 13-1203(A)(1), against his live-in girlfriend, Melissa Hale.

2. Issues Presented in this Case.

Appellant presents three issues in this appeal. Appellant claims that (1) the admission of the 9-1-1 tape, (2) the officer's testimony as to what the victim told him and (3) the playing of a tape recording of the alleged victim's statements to police deprived him of the right to confront and cross-examine the witnesses against him.

3. Standard of Review.

The standard of review for admission of evidence is abuse of discretion.[6] Harmless error review applies to a confrontation violation.[7] Despite finding an abuse of discretion, this Court may still affirm the action of the trial court if the error is harmless beyond a reasonable doubt.[8] Additionally, an appellate court must view the facts in the light most favorable to upholding the trial court's ruling, resolving all reasonable inferences against the appellant.[9]

4. Discussion of the Issues.

a. The Trial Court Did Not Err in Allowing the 9-1-1 Tape to be Admitted Against the Defendant.

[1] Reporter's Transcript ("R.T.") of April 15, 2003, at page 62-63.
[2] *Id.* at 63.
[3] *Id.* at 20.
[4] *Id.* at 28.
[5] *Id.* at 14.
[6] *State v. Tucker*, 68 P.3d 110, 119, 399 Ariz. Adv. Rep. 18 (2003).
[7] *State v. Lama*, 205 Ariz. 431, 440, 72 P.3d 831, 840 (2003).
[8] *State v. Dunlap*, 187 Ariz. 441, 456, 930 P.2d 518, 533 (App. 1996).
[9] *Sate v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Smith*, 136 Ariz. 273, 665 P.2d 995 (1983).

The State contends that the 9-1-1 tape was an admissible exception under Arizona Rule of Evidence 803(2).[10] In order to admit hearsay under the excited utterance exception:

> (1) there must have been a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made spontaneously, that is, soon enough after the event so as not to give the declarant time to fabricate.[11]

This Court finds that the 9-1-1 tape at issue in this case satisfies this test and therefore the trial court properly admitted the 9-1-1 tape as an excited utterance.

The Appellant argues that the 9-1-1 tape violated his constitutional rights to confront the witness against him. According to the Sixth Amendment of the U.S. Constitution, a defendant has the right "to be confronted with the witnesses against him."[12] Similarly, according to Article II, § 24 of the Arizona Constitution, a defendant has the right to "meet his witnesses against him face-to-face." Recently, the United States Supreme Court considered whether the confrontation clause of the Constitution's Sixth Amendment prohibits admission of out-of-court statements for their truth, without cross-examination.[13] The Court held that the confrontation clause precludes the admission of an out-of-court testimonial statement of a declarant against a defendant in a criminal case unless the declarant is present at trial and the defense has an opportunity to cross-examine the declarant, or the defendant has had a prior opportunity to cross-examine an unavailable declarant.[14] The decision held that testimonial evidence is what must be confronted, but the Court did not define the scope of "testimonial."[15] However the Court did explicitly state that the term "at a minimum applies to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations."[16]

Since *Crawford*, the Ninth Circuit addressed this very issue of whether a victim's statements to a 9-1-1 dispatcher were testimonial in nature.[17] The federal court allowed the testimony to be admitted where there was no "doubt that she [the victim who made the call] lacked the time or the incentive to reflect upon and confabulate a story."[18] Rather, the victim was speaking under the influence of the stressful event and the statements were not found to be testimonial.[19] Similarly, this Court finds that the victim's statements to the 9-1-1 dispatcher

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[10] Arizona Rule of Evidence 803(2) states that an excited utterance is not excluded by the hearsay rule if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."
[11] *State v. Anaya*, 165 Ariz. 535, 538, 799 P.2d 876, 879 (App. 1990).
[12] U.S. Const. Amend. VI.
[13] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
[14] *Id.* at 1374.
[15] *Id.*
[16] *Id.*
[17] See *Leavitt v. Arave*, 383 F.3d 809, 830 (9th cir. 2004).
[18] *Id.*
[19] *Id.*

were not testimonial, since they were not prepared in anticipation of a case or intended to be testimonial because of its emergency nature. Therefore, the trial court did not err in allowing the 9-1-1 tape to be admitted against the Appellant as an excited utterance. This hearsay evidence was not 'testimonial', and was, therefore, not precluded by *Crawford*.

b. The Trial Court Did Err in Allowing the Tape Recording of the Victim's Statements in Response to Police Questioning and in Allowing the Officer's Testimony as to what the Victim Told Him.

As previously stated, if testimonial hearsay evidence is at issue, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-examination.[20] A witness is not deemed "unavailable" for purposes of the hearsay exception to the confrontation requirement unless the state has made a "good-faith effort" to obtain the presence of that witness at trial.[21] The state must make a "reasonable" attempt to produce a witness.[22] In this case, the trial court did not determine whether the state had made a good-faith effort to produce Hale as a witness, but did note that the state did not have a return of service.[23] Secondly, and most importantly, there was no prior opportunity for the Appellant to cross-examine Hale.

The police interview elicited 'testimonial' hearsay in violation of *Crawford*. The Supreme Court explicitly stated that "statements taken by police officers in the course of interrogations are also 'testimonial' where "the absence of oath is not dispositive."[24] *Crawford* set forth further instruction to determine whether statements are testimonial. A court must decide if the statements "were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[25] After *Crawford*, other courts have broadly interpreted "testimonial hearsay" to include police questioning that occurs outside a custodial setting.[26] Likewise, this court concludes that the statements given by Hale in response to Officer Watson's questioning were 'testimonial' hearsay in violation of *Crawford* and the Sixth Amendment's Confrontation Clause.

The evidence at issue, both the tape recording and the officer's statements, are testimonial in nature. The statements made by Hale were declarative and affirmative in nature, made to establish or prove some fact of what happened, and Hale had obvious reason to expect that her statements would be used prosecutorially. Accordingly, the Officer's testimony as to what Hale told him was also testimonial hearsay. The trial court erred in allowing the police tape recorded interview and in allowing Officer Watson to testify as to what Hale told him in that

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[20] *Crawford*, 541 U.S. at ___ , 124 S.Ct. at 1374.
[21] *State v. Montano*, 204 Ariz. 413, 420, 65 P.3d 61, 68 (2003).
[22] *Id.* [quoting *California v. Green*, 399 U.S. 149, 189 n. 22, 90 S.Ct. 1930, 1951 n. 22, 26 L.Ed.2d 489 (1970)].
[23] R.T. at 17 and 131.
[24] *Crawford*, 541 U.S. at ___ , 124 S.Ct. at 1364.
[25] *Id.*
[26] See *People v. Lee*, 124 Cal.App.4th 483, 490, 21 Cal.Rptr.3d 309, 313 (App. 2004); *United States v. Saner*, 313 F.Supp.2d 896, 901 (S.D.Ind. 2004).

interview. Where there has been a violation of a constitutional right to confrontation, reversal is required unless the appellate court finds the error harmless beyond a reasonable doubt. Here, the court does not find that the hearsay was harmless beyond a reasonable doubt, but highly prejudicial. This court finds reversible error in the admission of the tape recorded interview with Melissa Hale and in the admission of Officer Watson's testimony regarding that interview.

IT IS THEREFORE ORDERED reversing the conviction and sentence from the Phoenix Municipal Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix Municipal Court for a new trial, and all further and future proceedings.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT